



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of

KAPLAN, Joshua D.

Serial No. 09/412,404

Filed: October 5, 1999

For: **NETWORK APPARATUS AND
METHOD FOR PREVIEW OF
MUSIC PRODUCTS AND COMP-
ILATION OF MARKET DATA**

)
) Group Art Unit: 2165

)
) Examiner: FADOK, Mark A.

)
) **SECOND DECLARATION OF MICHAEL
E. DERGOSITS UNDER RULE 1.132**

CERTIFICATION OF MAILING

hereby certify that this document was transmitted to
ommissioner for Patents, Post Office Box 1450, Alexandria
A 22313-1450 on this date October 27, 2006.

By: _____

Teri Nelmark

Commissioner for Patents
Post Office Box 1450
Alexandria VA 22313-1450
Sir:

Michael E. Dergosits, attorney of record in the above-referenced patent application,
hereby makes the following declaration under 37 C.F.R. § 1.132:

1. Attached as Exhibit D is a true and correct copy of an article entitled "Survey:
Listening Posts Important to Customers" that was published by *Billboard Publications, Inc.* on
June 8, 1996.
2. Attached as Exhibit E is a true and correct copy of an article entitled "'Interactive'
Really Means that the Record Business is Doomed" that appeared in the *Knight Ridder/Tribune
News Service* on April 21, 1994
3. Attached as Exhibit F is an article entitled "NewLeaf Stops Music But Not Games" that
appeared on the HighBeam Research website on February 17, 1995.

Respectfully submitted,

DERGOSITS & NOAH LLP

Dated: October 27, 2006

By: _____

Michael E. Dergosits
Registration No. 31,243



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PATENT
Attorney Docket No. 106.48

Four Embarcadero Center
Suite 1450
San Francisco, CA 94111
(415) 705-6377 Telephone
(415) 705-6383 Facsimile

Address correspondence to:

Michael E. Dergosits
DERGOSITS & NOAH LLP
Four Embarcadero Center, Suite 1450
San Francisco, California 94111
(415) 705-6377

Attorney Docket No. 106.48



67 of 129 DOCUMENTS

Copyright 1996 Billboard Publications, Inc.
Billboard

June 08, 1996

LENGTH: 374 words

HEADLINE: SURVEY: LISTENING POSTS 'IMPORTANT' TO CUSTOMERS

BYLINE: BY DON JEFFREY

BODY:

NEW YORK--About 70% of music consumers say that it is "somewhat important" to preview music on retail listening stations before making purchases, according to a new report.

The survey also indicates that the most frequent users of store listening posts are males whose musical preference is R&B.

The report on listening stations was conducted for the National Assn. of Recording Merchandisers by the Department of Recording Industry at Middle Tennessee State University. A marketing research class surveyed 427 customers at random as they left 15 music stores in 11 cities during November 1995 and January 1996. A variety of stores was used for the study.

According to the results, the average amount of time that a customer spent listening to music was 12.03 minutes, soul/R&B fans spent the most time listening per visit, and modern rock votaries spent the least amount of time listening. The study also says that men spent 25% more time at the activity than do women.

The survey states that customers "are most likely to buy the record initially planned after using the listening station." In addition, it says that "if they don't buy the intended record, customers are more likely to buy something else than buy nothing." Moreover, customers "are more likely to make incremental purchases based on listening station use."

Of those who do not use listening stations, the most cited reason (by 70.3% of respondents) was that the consumer's "decision to purchase a particular title has been made prior to entering the store."

Despite the importance of listening stations in purchasing decisions, only 5.3% of those surveyed said they shopped at a store because it had listening stations. The most crucial reason for patronizing a music retailer (38.2%) was location. Next came selection (27.7%) and price (22%).

LOAD-DATE: June 04, 1996



'Interactive' really means that the record business is doomed

Knight Ridder/Tribune News Service; 4/21/1994; Pitts, Leonard, Jr.

**Knight Ridder
Tribune**

The record industry is on its way to obsolescence. The future is coming, pedal to the metal. Get interactive, or get out of the way.

The barons of the record industry are watching the change rush toward them the same way the deer watches the 18-wheeler. H. Wayne Huizenga is the man who stampeded the poor, dumb beasts out into the middle of the information superhighway, but I wouldn't be too surprised to see him get smacked by that same truck before it's all over.

If you're not up to speed on any of this, well, here's what I'm talking about: Last spring, Blockbuster, in partnership with IBM, rolled out the NewLeaf system for digital delivery of music. It was designed to enable a record-store consumer to "make" a compact disc _ complete with packaging _ by accessing a computer database.

According to a recent Billboard magazine, the system is expected to be up and running by September 1995, if not before.

Think about what this means. The record you want is always available, no matter how obscure or specialized it is. No more running from store to store. No more placing special orders. No more calling around town.

You can easily understand the implications. Blockbuster and IBM did, too. Understandably excited, they issued a joint statement last year announcing the new technology. Executives sounded giddy over the potential. "This will have a very profound effect on the way we work and the way we play," said James Cannavino, general manager of IBM personal systems. "People will be able to walk into a store and have their products manufactured right there."

All of which told me that, though Cannavino may know his computers and Huizenga may be a wizard in video, when it comes to the business of music, they don't know jack, Jack. They are babes in the woods. Or, if you prefer, deer frozen on the highway.

Sure enough, the music industry reacted to the press conference with blistering speed and uncommon hostility. Five of the big six (the parent company of the sixth, PolyGram, owns a stake in Blockbuster) made their positions clear in no uncertain terms.

"The Blockbuster/IBM venture into music distribution ... does not have the support of the Warner Music Group," said a statement issued by Warner.

Al Teller, chairman of MCA Music Entertainment Group, was even more blunt in an interview: "Did they think we would give up our baby? C'mon. This proposal is meaningless to the music industry because we are just not going to cooperate with them."

Blockbuster and IBM seemed caught off guard. Spin doctors sprang into action to portray the whole thing as a simple communications mixup, but it was deeper than that: A year later, there apparently has been no movement toward an agreement. And MCA says it is working on its own digital download system.

The record companies' position is easy to understand: If you've developed a system that delivers music directly to the consumer in the store, then you've rendered distribution networks, shippers and trucks _ a large chunk of the record industry _ obsolete.

Huizenga and company swear they have come to complement the record industry, not to bury it. They say their system will allow retail stores to stop using valuable space to stock "deep catalog" (industry-ese for 25-year-old Cream albums). They say **NewLeaf** and record companies can co-exist much in the way multiplexes, VCRs and cable channels have learned to.

Sounds sensible enough, but nobody's listening.

Three years in South Florida have given me healthy respect for H. Wayne's uncanny ability to get what he wants. But he needs to know, if he doesn't already, that these aren't NFL team owners or suck-up county officials he's wooing.

This is the music biz, and these boys _ yes, they're all boys _ are a breed apart. Music has been their private money pie since ... forever. They don't like even each other much, and worse, Huizenga is an "outsider," one they think is trying to wedge himself between them and their profits.

Huizenga's going to have to do some fancy dancing to keep from getting knocked silly on the information superhighway. He and IBM may take a hit that leaves them shaken, but at least they'll be wiser for it.

It's the record industry that's facing the kind of hit that kills.

Because the future is coming, and it's honking the horn and flashing its lights.

If you caught "Future Shocks," the December cover story in *Musician* magazine, you know what I mean. Their version of the future goes something like this:

Forget Blockbuster's quaint little system, in which you make a record at a kiosk in a store. How about a system that lets you order music through your computer modem at home? You download it onto a blank compact disc in your computer's CD drive. You download the cover art and liner information onto a sheet of laminated cardboard in your laser jet printer. You charge the whole transaction to your credit card.

And the technology to do this exists now.

This is not pie in the sky, folks. It's pie in the face of the major labels. Because if it becomes possible to bypass problems of distribution and manufacture, what does an artist need a record company for? Especially since, as *Musician* points out, the company takes something like 80 percent of the sale price of a new cassette or CD. Indeed, why should even a talented unknown have to put her prayers and demo tape in the mail, hoping the majors will notice her? The majors will be minor, if not nonexistent. We're talking a whole new playing field here.

Yes, record companies provide other services _ publicity and promotion, for instance. But any number of firms out there could do that at a fraction of the cost.

The only other thing labels do is own or co-own copyrights on their albums. That's the monkey wrench they can throw into the whole works. But even that might only get them so far, because then you get into the natty question of what exactly is copyright: Is it the physical CD or the performance recorded on it? How could a record label own the copyright to a performance when it did nothing _ no singing, no horn playing, no arranging _ toward creating it?

It's a thorny patch, all right. All these issues are being worked out in the courts, and it's going to be fun to watch how it all shakes out.

I know only two things for sure:

H. Wayne may lose the battle, but consumers are poised to win the war.

And this is a Maalox moment in the executive suites of the record business.

Because the future is coming ...
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NewLeaf stops music but not games. (NewLeaf Entertainment aborts plans to create compact discs and audiocassettes on demand in stores)



Video Business; 2/17/1995; Scala, Betsy

Blockbuster Entertainment Group is cautiously optimistic about introducing electronic videogame delivery to retail stores, but plans for manufacturing music product in stores have been scrapped.

NewLeaf Entertainment, a joint venture of Blockbuster and IBM, last week said it won't use its electronic delivery technology to create audiocassettes and compact discs on demand in stores, as it had planned since its inception.

Blockbuster also acknowledged that NewLeaf will be virtually dismantled, transferring marketing duties to Blockbuster and Fairway Technologies, another Blockbuster-IBM joint venture.

The NewLeaf name, though, may survive in some form.

The shift away from music is apparently the result of opposition by the major record labels, concerned about copyright infringement and reduced royalties to artists as a result of replication of music titles in stores.

The dismantling of NewLeaf will not affect Blockbuster's test of electronically delivered videogames, according to Blockbuster VP of technology Robert Carberry, who declined to discuss the music issue.

NewLeaf's six-month test of downloading videogames for rental in 10 stores in Columbia, S.C., and two stores in Boca Raton, Fla., is scheduled to end this month. Although Blockbuster will formally begin evaluating the test outcome then, Carberry described initial results as "extremely positive."

The company subsequently may hold tests in other markets, but Carberry said it could take 12 to 18 months to select the right markets.

Blockbuster continues to seek opportunities for the electronic delivery of CD-ROM programs and other full-motion video to stores. "The technology base is similar for CD audio," Carberry said. "Yes, we are continuing to look at the opportunities."

About 200 to 300 Sega games have been the basis of the current test, with the participation of Sega of America and a majority of its third-party licensees, including Virgin Interactive Entertainment and Acclaim Entertainment. Results of the test will be sent to Nintendo of America, Carberry said.

Fairway and NewLeaf Technologies were created as joint ventures of Blockbuster and IBM in mid-1993. The entities were to develop and market a system that permits audio and video software to be digitally delivered to stores. A retailer could then manufacture a cassette, cartridge or disc for sale or rental.

In theory, the system would allow retailers to create inventory on demand.

In the Blockbuster test, new game titles have been added to the system at the time of the cartridge releases, Carberry said.

Lee Isgur, managing director of investment firm Jefferies & Co., San Francisco, was not surprised by the decision to scale back NewLeaf.

Blockbuster is undergoing sudden changes, he said, because of its new parent company, Viacom Inc., which completed acquisition of the giant retailer late last year. He said that, although Blockbuster is still moving forward with new technology, "they have to look over their shoulders and see what the parent is thinking."

John Taylor, managing director of Arcadia Investment Corp., believes Blockbuster should expand quickly while there is still interest in 16-bit games. "If you wait a year or two, you may miss an opportunity to minimize inventory risk," he said, advising similar haste if Blockbuster hopes to add other platforms, such as CD-ROM, to the system's capabilities.

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